



State of Idaho

DEPARTMENT OF WATER RESOURCES

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MEMORANDUM

To: Senator Laird Noh
Representative Dell Raybould
Co-Chairs, Natural Resources Interim Committee on
Water Supply and Management Issues

Date: June 23, 2004

From: Karl J. Dreher

Subject: Swan Falls Agreement and Eastern Snake River Plain Aquifer

This memorandum is provided to the Interim Natural Resources Legislative Committee on Water Supply and Management Issues in response to questions regarding the effect of the Swan Falls Agreement on conjunctive administration of ground water rights diverting from the Eastern Snake Plain Aquifer and surface water rights diverting from hydraulically-connected surface water sources. These questions have arisen as a result of the following two papers that have been presented to the Legislative Committee: (1) "Idaho Water Issues of the 21st Century, The Watermaster's Perspective" by Ronald D. Carlson, Watermaster for Snake River Water District 1; and (2) "Initial Comments to the Natural Resources Interim Committee on Water Supply and Management Issues" by the Idaho Ground Water Appropriators, Inc., dated April 7, 2004. It should be noted that numerous issues regarding the interpretation of the Swan Falls Agreement have arisen since it was signed almost twenty-years ago. And as both papers demonstrate, there are strongly held views on the proper resolution of some of these issues. However, in the absence of any definitive judicial resolution of these issues, as the Director of the Idaho Department of Water Resources I must be guided by the plain language of the Swan Falls Agreement and the Department's past application of the Swan Falls Agreement. This memorandum will summarize some of the relevant actions taken by the Department to date in implementing the Swan Falls Agreement.

The Swan Falls Agreement, dated October 25, 1984, was a settlement of two cases brought by the Idaho Power Company against the State of Idaho and the holders of certain surface and ground water rights under which water was diverted above Swan Falls Dam. As part of the Swan Falls Agreement, the Idaho Power Company and the State of Idaho executed what is commonly known as the 1180 Contract to implement the provisions of Senate Bill 1180. Together, these two documents constitute what is commonly referred to overall as the Swan Falls Agreement (the "Agreement").

The Agreement subordinated the non-consumptive hydropower water rights of the Idaho Power Company to existing upstream consumptive uses under surface and ground water rights within the Snake River Basin with priority dates earlier than July 1, 1985. This subordination to existing water rights was unconditional. In addition, the Agreement subordinated the hydropower rights held by the Idaho Power Company to depletion under certain future upstream beneficial uses under future rights acquired pursuant to state law; provided, however, that the Idaho Power Company is entitled as against these future uses to an "unsubordinated right" of "3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls."

While the plain language of the Swan Falls Agreement determines the priority relationship between Idaho Power Company's hydropower water rights for its facilities above Swan Falls Dam as against all other water rights above Swan Falls Dam, the view has been expressed that the Swan Falls Agreement also subordinated all uses from the springs in the Thousand Springs Area to the 3,900 cfs and 5,600 cfs flows specified in the Agreement to be maintained at the Murphy gauging station. The foundation for this view lies in the fact that the Agreement expressly contemplated future ground water development from the Eastern Snake Plain Aquifer that could result in depletions to the flow of the Snake River at Murphy down to the minimum flows established by the Agreement. Policy 32F of the State Water Plan is cited as further support for this view. Policy 32F was adopted in 1986 after the signing of the Agreement and, in part, provided:

The minimum flows established for the Murphy gaging station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist.

While there is no question that the Agreement resolved the impediment created by Idaho Power Company's hydropower water rights to future development of surface and ground water supplies above Swan Falls Dam, the assertion that the Agreement also subordinated other spring users water rights is not clear on the face of the Agreement. Given the specificity with which the Agreement is drafted, it is logical to conclude that the parties would have expressly included a provision stating that other surface water rights from spring sources were also being subordinated by the Agreement, had that been the intent of the parties to the Agreement. This would seem to be particularly true given the valuable property rights that would have been affected by such an interpretation. Further, a nonbinding policy statement of the Idaho Water Resource Board regarding only aquaculture rights does not give rise to such an interpretation. Indeed, no specific action was ever taken by the Idaho Legislature to implement Policy 32F of the 1986 State Water Plan and, in fact, Policy 32F was changed and replaced with Policy 5H by the Idaho Water Resource Board in 1996. Policy 5H provides:

It is the policy of Idaho to seek to maintain spring flows in the American Falls and Thousand Springs reaches of the Snake River which will sustain beneficial uses of surface and ground water supplied in accordance with state law.

A natural reading of these policies is that they constitute a recognition by the Idaho Water Resource Board that in applying the prior appropriation doctrine various principles must be confronted such as the requirement that the holder of a water right employ a reasonable means of diversion, that exercise of a water right can not unreasonably impede use of a water source by other lawful appropriators, and that the futile call doctrine is a potential defense to a delivery call against junior priority ground water rights. These principles and other principles embodied within the prior appropriation doctrine provide the mechanisms for balancing development of our limited water resources with the protection of senior priority water rights. Indeed, such an interpretation is consistent with the implementation of the Agreement by the Idaho Department of Water Resources.

As provided under the Agreement, the State of Idaho commenced a general adjudication in 1987 of all rights to the use of surface and ground water within the Snake River Basin in Idaho to provide a basis for the effective administration of water rights from the interconnected sources within the basin. In 1994, the Interim Legislative Committee on the Snake River Basin Adjudication reiterated that "[c]onjunctive management of ground and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication." *1994 Interim Legislative Committee on the Snake River Basin Adjudication Report at 36*. In accordance with Idaho's adjudication statutes and legislative directive, the Snake River Basin Adjudication ("SRBA") District Court has determined that all water sources will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law, unless shown to be a separate water source. *Basinwide Issue 5 Memorandum Decision and Order dated February 27, 2002*. Since the water sources for the springs discharging in the Thousand Springs Area are hydraulically connected to the ground water comprising the Eastern Snake Plain Aquifer, there is no factual basis for arguing that the aquifer is a separate source. Consequently, the principles of the prior appropriation doctrine as established by Idaho law govern the administration of both ground water rights from the Eastern Snake Plain Aquifer and surface water rights from sources in the Thousand Springs Area.

The conclusion that the prior appropriation doctrine as established by Idaho law governs the administration of both the surface water rights from sources in the Thousand Springs Area and ground water rights from the Eastern Snake Plain Aquifer is also confirmed by rules adopted by the Department of Water Resources. In 1994, my predecessor adopted statewide Rules Governing the Conjunctive Management of Surface and Ground Water. Rule 50 specifically designates the Eastern Snake Plain Aquifer as an area determined to have a common ground water supply, meaning that the diversion and use of ground water from the aquifer affects hydraulically-connected ground water and the flow in hydraulically-connected surface waters.

Following the entry of partial water right decrees by the SRBA District Court and the creation and extension of Water Districts No. 130 and No. 120 in 2002 and 2003, I issued an *Amended Order* on March 10, 2004, in response to a water delivery call by Rangen, Inc., the holder of various surface water rights diverted from spring sources. That order requires the holders of certain consumptive ground water rights subject to administration in Water District No. 130 not to divert ground water beginning April 1, 2004, unless sufficient replacement water is provided as set forth in the *Amended Order*. Legal challenges to the validity of the *Amended Order* and previous orders are pending before the Department of Water Resources and have been temporarily stayed for a one-year period, relating to the initial time period for the work of the Interim Natural Resources Legislative Committee on Water Supply and Management Issues. In addition, litigation before the Ada County District Court has been filed challenging the constitutionality of the Conjunctive Management Rules and the manner in which I have applied those rules, which litigation has also been stayed.

Clearly, the actions that the State of Idaho and the Department of Water Resources have taken following the Swan Falls Agreement are predicated on the premise that water rights from springs in the Thousand Springs Area and ground water rights from the Eastern Snake Plain Aquifer are to be administered as being from hydraulically-connected sources under the prior appropriation doctrine as established by Idaho law and that the Agreement only defined the relationship between surface and ground water rights and non-consumptive hydropower rights held by Idaho Power.

In setting the current course for conjunctive administration of water rights from inter-connected ground and surface waters in the Eastern Snake River Plain, I have followed what I have concluded to be the logical course anticipated by the commencement of the Snake River Basin Adjudication and the promulgation of the Conjunctive Management Rules. The dilemma we confront is that various parties have been unable to agree upon the extent that various legal principles (such as reasonable means of diversion, full economic development, and defenses or lack of defenses to administration by priority) come within Idaho's prior appropriation laws. As a community of water users, legislators, and state officials, we have a choice: if we want to continue to debate the parameters of Idaho's laws implementing the prior appropriation doctrine and the meaning of the Swan Falls Agreement, we should proceed directly with litigation; alternatively, we can agree to disagree on the governing legal principles and pursue a negotiated outcome. I firmly believe our efforts should be directed toward pursuing the latter rather than the former because in the end, a litigated solution is unlikely to lead to a lasting outcome acceptable to our community as a whole.